

OPD APPELLATE WINS - MAY TO AUGUST 2008

The Appellate Section of the OPD had major wins in the middle third of this year.

CONFESSIONS AND OTHER STATEMENTS

In this pre-trial appeal, the Appellate Division reversed an order denying suppression of a confession. The Court ruled that the detectives conducting the interrogation did not scrupulously honor the defendant's right to remain silent. Defendant in this case did not merely refuse, repeatedly, to sign the form presented to him: he also explained that he would not sign the form because he did not want to make a statement. And yet the questioning did not cease; rather, it continued for almost one-half hour more until defendant finally relented and signed the form as the detectives had pressed him to do. State v. Jacob Burno-Taylor (June 19, 2008)

Convictions reversed, case remanded after re-consideration ordered by New Jersey Supreme Court. Based on consideration of the totality of circumstances, the Appellate Division concluded that defendant's post-warning statements were not made following a knowing, intelligent and voluntary waiver of his Miranda rights. As a result of the pre-warning questioning, defendant made incriminating statements that thereafter rendered him incapable of effectively exercising his Miranda rights. Defendant's pre-warning statement rendered the subsequent Miranda warnings ineffective. The warnings did not provide defendant with an opportunity to exercise his privilege against self-incrimination. State v. Rashawn White (July 8, 2008)

CONFRONTATION

The New Jersey Supreme Court reversed an adjudication of delinquency in this case **statements made by a non-testifying witness** to a police officer, describing a robbery committed ten minutes earlier, and his pursuit of the robbers, were admitted in **violation of state hearsay rules and the Sixth Amendment's Confrontation Clause**. The statements were "testimonial" in the constitutional sense because they were a narrative of past events and made while neither the declarant nor victim was in imminent danger. For the same reasons, the statements were not the equivalent of describing the crime 'immediately after' it occurred, and the Court concluded that the family court abused its discretion by admitting the witness's statements under the "present sense impression" or "excited utterance" exceptions to the hearsay rule. State in the Interest of J.A. (June 23, 2008)

CUMULATIVE ERROR

In this criminal prosecution for vehicular homicide, the Appellate Division reversed the conviction because: (1) where the jury's repeated questions indicated confusion about the requisite mental state for vehicular homicide, it was **not sufficient for the trial court to re-charge the jury on recklessness**. It should have **compared recklessness with negligence** in light of the jury's questions; (2) the trial court committed reversible error when it **precluded the defendant from cross-examining the State's expert** on the coefficient of friction, which the expert testified was critical in formulating his opinion on the speed of the defendant's vehicle at the time of the accident; (3) the trial court committed plain error when it **failed to strike and give a curative instruction for the prosecutor's repeated remarks that overstepped the bounds of propriety and deprived the defendant of a fair trial (including describing defendant as "drunk" or "blotto" and saying that he was "closing in on the kill" when hit the victims)**; (4) the trial court's **denial of the defendant's application to argue negligence in summation contributed to cumulative error**; and (5) where there was evidence that the defendant may have been impaired by the use of alcohol but where there was no evidence that he was driving while intoxicated under the statutory standard under N.J.S.A. 39:4-50, the trial court should have **instructed the jury on the blood alcohol concentration** required for a per se DWI. State v. Sky Atwater (May 21, 2008)

The Appellate Division reversed the convictions of both defendants because it concluded that the cumulative effect of several trial errors deprived defendant of a fair trial: a.) the trial judge should have struck the investigating officer's testimony that Tranberg, a State's witness who claimed only to have "seen" the robbery but not participated, was not charged because the **officer "believed" Tranberg was "telling the truth."** b.) trial judge **erroneously barred defense from obtaining full disclosure of Tranberg's record as a "confidential informant"** in narcotics cases despite references in a police report identifying him as "a confidential informant." c.) defendants were prejudiced by: (1) Officer Denham's **testimony regarding the "narcotics investigation"**; and (2) Tranberg's **testimony that defendants were "in jail."** These two statements, taken together, likely raised an inference in the minds of the jurors that defendants were "criminals." State v. Lawrence K. Gay and Kenneth Gay (June 25, 2008)

DEFENDANT'S PRESENCE/ABSENCE

Appellate Division judgment reversing convictions affirmed by the New Jersey Supreme Court, but on grounds other than those relied on by the lower court. It was error by the trial court to charge the jury that defendant's voluntary absence from trial, without more, was sufficient to justify instructing the jury that

it could consider that absence as demonstrating consciousness of guilt. A flight charge should not lie when a defendant absents himself from trial unless separate proofs are tendered to sustain the claim that the defendant's absence was designed to avoid detection, arrest, or the imposition of punishment. Many different motives may lie behind a defendant's voluntary absence from trial, not all of them congruent with a consciousness of guilt. Although the trial court properly continued the trial despite defendant's unexplained absence, the added steps of allowing the State to argue that defendant's absence constituted consciousness of guilt evidence followed by the trial court's instruction to that effect were not harmless, much less harmless beyond a reasonable doubt. State v. Shariff Ingram (July 21, 2008)

DEFENSES

The New Jersey Supreme Court affirmed the Appellate Division judgment reversing defendant's convictions and remanding case for new trial. the Court agreed with the appellate panel that the trial court's repeated instruction to the jury that self-defense did not apply to manslaughter was prejudicial error. Statutory and case law support the Appellate Division's conclusion that the State's failure to meet that burden to disprove self-defense beyond a reasonable doubt would entitle Rodriguez to an exoneration of criminal liability on the murder, aggravated manslaughter, and manslaughter charges. State v. Wilberto Rodriguez (June 9, 2008)

EVIDENCE

The New Jersey Supreme Court reversed defendant's convictions because the trial court admitted evidence that defendant sold drugs to co-defendant over a six-month period prior to the robbery under a theory of res gestae. The Court held that the evidence that defendant and Gendron planned the robbery so Gendron could obtain money to purchase drugs and that Gendron and defendant had known one another for some time was relevant and admissible. However, the **probative value of testimony of six months of prior drug sales was outweighed by its prejudicial effect** and the evidence should have been excluded." The Court also found that the **limiting instruction** given by the trial court was inadequate to eliminate the prejudice because it did not inform the jury "that the evidence was limited solely to establish defendant's motive and intent." State v. Diara Barden (June 24, 2008)

Convictions reversed by the Appellate Division. Admission of testimony of arresting officer concerning the neighborhood in which surveillance was established violated N.J.R.E. 404(b). The arresting officer's testimony that he conducted surveillance operations in the area "[m]any times over the years[,] " that he had made "[s]everal hundred[]" arrests in that location over the years,

the fact that police "would get complaints about [this area] on a regular basis about alleged drug activity[,] and that he knew defendant prior to December 17, 2004, unfairly prejudiced defendant by implication. By allowing the officer to testify in this manner, the jury was permitted to impermissibly infer that defendant was engaged in narcotics activities and present at that location to engage in narcotics activities. State v. Donduran Boatman (August 6, 2008)

Reversal of convictions by Appellate Division affirmed by the New Jersey Supreme Court, but for different reasons. The trial court **abused its discretion when it denied defendant from fully presenting his alibi testimony**. Absent a finding that the factors on balance favor preclusion, the interest of justice standard requires a less severe sanction than preclusion of the testimony. This is not that rare circumstance when a defendant's violation of the alibi rule should have resulted in the sanction of preclusion.

In the same case, the Court disapproved of the prosecutor's argument during summation that "people with handicaps ... have stronger sensory perception," and that the victim, a deaf mute, was "a lifelong 40-year-old trained observer," and that "[h]er whole world is about her ability to recognize things," to suggest that the victim had a stronger sensory perception than a person without a handicap. However, the State did not present evidence that the victim had a stronger sensory perception because of her condition. Consequently, those comments implied that the victim would not make a mistake in her identification of defendant due to her heightened sensory ability and went beyond the reasonable inferences from the evidence in the case. State v. Darren L. Bradshaw (July 10, 2008)

Conviction reversed by the Appellate Division. Trial court erred in allowing a police witness who was **never properly qualified as an expert** to give his **opinion on the ultimate issue of defendant's guilt**. Officer Sutton was never qualified as an expert witness, he was never asked a hypothetical question, and he was frequently permitted to express an opinion about defendant's guilt - albeit without saying the word "guilty." Moreover, except for telling the jury that drugs are secreted in the mouths of those who buy or sell them, his testimony provided no evidence regarding the modus operandi of street narcotic sales. Furthermore, Sutton was repeatedly permitted to testify about his prior knowledge of Scruggs [alleged buyer from defendant] and his belief that she was in the area, which he described as a "high drug trafficking area" and "the scene of numerous arrests in the past," to buy drugs. A police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant. State v. Michael Carter (May 12, 2008)

In this case. defendant claimed error in the **admission of other crimes evidence** through the testimony of Robertson (co-

defendant who testified for the State), consisting of defendant's act of rubbing a gun barrel between her legs to awaken her in the middle of the night and of uttering terroristic threats, on the ground that the testimony was relevant to bolster Robertson's credibility. Robertson offered no evidence of any sort of direct threat by defendant designed to compel her participation in the robbery, and she did not specify when the act and statements that she characterized as threatening took place. Because there was no meaningful distinction between the testimony given by Robertson and the testimony deemed erroneously admitted in previous published cases, the Appellate Division agreed with defendant that the admission of Robertson's other crime testimony constituted reversible error. State v. Tyrone Daniels (May 21, 2008)

The New Jersey Supreme Court reversed defendant's conviction for robbery. While the details of defendant's confession to having engaged in a two-day robbery spree properly were admissible against him at his trial as evidence of motive, opportunity, intent, preparation, and plan, as provided in Evidence Rule 404(b), the admission of evidence concerning a **prior uncharged robbery also involving defendant** occurring eight hours before the felony murder in this case was error requiring a retrial. State v. Tykim Kemp (June 16, 2008)

CDS Convictions reversed by the Appellate Division because defendant was denied his Sixth Amendment right of confrontation by being **unable to call defendant's mother as a defense witness to respond to what he claimed to be 'surprise' evidence** when Officer Kohler testified that the seller was clean-shaven, whereas defendant had a beard and mustache at the time of the offense four months before the arrest. The trial judge concluded that the mother, who was not listed on defendant's witness list and who had sat in the courtroom during a part of the trial, could not testify in light of the sequestration order. Particularly because defendant was described by Kohler as having different facial features in the photo provided in discovery than described at the time of offense, and Kohler never described defendant as having or not having a beard or mustache in any pretrial description or report, and because the testimony about the absence of facial hair can reasonably be deemed to be unexpected, the trial judge's ruling was a mistaken exercise of discretion that deprived defendant of a fair opportunity under the circumstance to present a defense. State v. Aaron Ritman (June 3, 2008)

Appellate Division judgment affirming convictions affirmed in part, reversed in part, new trial ordered by the New Jersey Supreme Court. **Third party guilt evidence** that the two victims' brother sexually abused them before defendant allegedly did should have been allowed. Based on the complete record before them and the arguments advanced by defendant, the Court found the evidence

relevant. It was not disputed that when the allegations of sexual abuse first arose, one victim only revealed that she was abused by defendant and made no reference to the abuse by her brother. It was not until after several interviews that each revealed that they had been sexually abused by another person, and the statements of the sisters concerning the abuse by their brother differed in some respects from the testimony the brother gave to the Grand Jury. Thus, there were credibility issues among the stories advanced by the three children. Secondly, the Child Sexual Abuse Accommodation Syndrome (CSAAS) testimony of the State's expert provided a 'ring of truth' to the testimony of the sisters. Without knowing that the victims had previously been abused by their brother, the jury was asked to evaluate the CSAAS testimony on an incomplete record. Finally, when the prosecutor on cross-examination asked defendant why one victim would lie about the abuse, the prosecutor's request to withdraw the question should have been granted. However, once defendant was required to answer the question, he should have been permitted to answer truthfully, including a reference to the brother's conduct. State v. Scott E. Schnabel (July 29, 2008)

GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS

Order dismissing complaint for child abuse and neglect against defendants was affirmed by the Appellate Division. DYFS argued that the trial court's decision was unsupportable because the judge misapplied the burden of proof under the child abuse law. According to DYFS, once its proofs established a prima facie case of abuse, the burden of persuasion (not merely the burden of going forward with evidence) shifted to J.L. and T.L., and obligated them to affirmatively prove their nonculpability by a preponderance of the evidence. The Appellate Division disagreed and ruled that in the circumstances of this case, after DYFS established a prima facie case, a burden of going forward with evidence was imposed on defendants, but the burden of persuasion remained on DYFS. DYFS v. J.L. and T.L./In the Matter of Guardianship of O.L. (June 5, 2008)

Termination of parental rights vacated, case remanded for further proceedings by the New Jersey Supreme Court. The Appellate Division affirmed the Family Part's termination of a mother's parental rights to her daughter, who is now almost thirteen years old, based in large part on the mother's addiction to drugs, psychological problems, and unstable lifestyle, all of which made her unfit to care for her child for most of the child's life. Although mother and daughter had not lived together for more than nine years, they had maintained a loving relationship, through periodic visits and telephone conversations. Despite the mother's manifest deficiencies, they have developed a strong emotional bond with each other. In the unique circumstances of this case, a parent-child relationship that continued to provide emotional sustenance to the child should not have been severed based on the

unlikely promise of a permanent adoptive home. The Division of Youth and Family Services did not prove by clear and convincing evidence that termination of Emilia's parental rights would not do more harm than good. DYFS v. E.P./In the Matter of Guardianship of A.H. (July 14, 2008)

JURY INSTRUCTIONS

Convictions for armed robbery and conspiracy reversed by the Appellate Division. Jury instructions regarding **accomplice liability** were so flawed as to constitute prejudicial plain error. The judge's charge on accomplice liability failed to inform the jury what the consequences would be if they found that the defendant had a different level of criminal liability than his unidentified accomplice. Defendant correctly points out that a properly charged jury would have understood that, even if they were convinced he actively participated in the robbery, failure to find that he shared the intent to commit armed robbery should have led to a conviction for the lesser included offense. The Court also cited the trial court's failure to give the jury a **Hampton/Kociolek charge** as prejudicial plain error. The charge did not properly apprise the jurors that "[o]ral statements should be viewed with caution because of the "generally recognized risk of inaccuracy and error in communication and recollection of verbal [utterances] and misconstruction by the hearer." The omission of these instructions amounted to harmful error. None of the eyewitnesses were able to positively identify defendant as the assailant. As such, defendant's own admission that he was present at the La Mirage Motel on the night of the robbery and that he possessed knowledge of the criminal event being investigated by police, was a key item of proof in the State's case. However, as discussed above, such evidence was admissible only with the omitted cautionary instruction. State v. Donte R. Crumidy (July 9, 2008)

Armed robbery conviction reversed by the Appellate Division because the jury was told, incorrectly, that "[a]rmed means possessing an implement [the knife] in a way that makes it available for use as a weapon. The defendant's intent with respect to the object is irrelevant." This instruction was incorrect because the jury was told it could convict defendant of first-degree robbery even if it believed defendant never actually used, threatened to use, or intended to use the knife. State v. Maribel Rolon (June 20, 2008)

Convictions reversed by the Appellate Division for several reasons. First, the trial court's charge on **accomplice liability** was so deficient as to constitute prejudicial plain error. The State charged defendant as an accomplice to the two men who used knives during the course of the robbery. The charge on accomplice liability failed to convey to the jury that if defendant did not

share the principals' intent regarding the use of a deadly weapon, a knife, in the robbery, she could be convicted of second-degree robbery. The shared intent requirement was limited only to theft as a lesser-included offense. Reversal was also justified because the trial court failed to charge the jury that the victim's **prior inconsistent statements could be used as substantive evidence**. The victims' testimony that defendant took Ferreira's purse was a critical component of the prosecution's case against defendant. Defendant was not in possession of the purse when she was apprehended, nor did she possess the stolen property that had been removed from the purse, and the jury acquitted her of the weapons charge. Under these circumstances, it was plain error not to charge the jury that the inconsistent statements could be used as substantive evidence. Finally, the prosecutor essentially asked the jury to consider **defendant's silence after her arrest as evidence that her version of the robbery was false**, and to conclude that defendant should have called Rivers and Roberts as witnesses to corroborate her testimony. The prosecutor's cross-examination questions and closing remarks violated defendant's privilege against self-incrimination and substantially shifted the State's burden to prove defendant's guilt beyond a reasonable doubt. State v. Aneesha Scott (July 16, 2008)

Convictions reversed by the Appellate Division. Although defendant did not object to the jury instruction, which did not adequately address his evidence of **alibi**, its relevance to proof beyond a reasonable doubt or improper argument presented by the prosecutor, the Court rejected the State's contention that the errors were harmless. The defendant offered 'alibi' evidence to support his general denial of guilt. However, the jury charge contained no reference to defendant's factual claim supported by the testimony of Tankard and Cook or the relevance of that evidence to the State's obligation to prove his guilt beyond a reasonable doubt. In addition, the assistant prosecutor's cross-examination of Tankard about Davis's whereabouts and her argument to the jury about the quality of the defense investigator's efforts and the absence of Davis was clearly capable of raising a question in the jurors' minds as to whether defendant was required to establish his whereabouts. The assistant prosecutor's closing argument, which suggested a negative inference based on a failure to produce a corroborating witness within the control of the defense, was made without first seeking leave of the trial court out of the presence of the jury, had the same potential for creating confusion about defendant's obligation to establish his whereabouts. State v. Mack Charles Shepard (June 27, 2008)

Conviction reversed by the Appellate Division because plain error committed by faulty jury instruction on **accomplice liability**. The jury was instructed that it could find defendant guilty either of armed robbery or of the lesser-included offense of robbery. The

trial judge's failure to give a proper accomplice liability charge that would have allowed the jury to find defendant guilty of theft rather than robbery was particularly prejudicial to defendant in light of the evidence. Although J.H. testified that defendant had a knife in his possession, there was no evidence that defendant ever withdrew that knife from his pants pocket at any time during the events in Covington's apartment. Defendant acknowledged possession of that knife but testified he only used it to cut cocaine. Detective Davis testified that, upon encountering defendant hiding behind the bedroom dresser, he searched defendant and found a knife hooked to his pants pocket. State v. Wayne Stevens (June 25, 2008)

The Appellate Division reversed the conviction and remanded this case for a new trial because of the judge's refusal to instruct the jury on **self-defense**. The shooting followed a long argument, which calmed down at times. The gun, which may well have been brought to the scene by the victim, went off during a struggle, and the jury could have found that the victim was trying to regain control of the gun to shoot defendant. Consequently, the jury, if properly charged, could have found that the State failed to prove that defendant's conduct was not in self defense. State v. Steve Walker (May 22, 2008)

JURY SELECTION

Convictions reversed by the Appellate Division following remand "to the trial court to determine whether the prosecutor had made discriminatory use of her peremptory challenges," after which the trial court ruled that discriminatory use had not been shown. Court re-affirms trial court's original ruling that defendant had made a prima facie showing of discriminatory use. Even if the State can be said to have come forward with evidence that the peremptory challenges under review [use of her first seven peremptory challenges to dismiss black or hispanic jurors] are justifiable on the basis of concerns about situation-specific bias, if a trial judge erroneously rules that a defendant has failed to establish a prima facie case of the discriminatory use of peremptory challenges and for that reason fails to call upon the prosecutor at the time of trial to give reasons for the exercise of those challenges, the trial judge's capacity to make such evaluations of demeanor is diminished and in some instances may be lost. The trial court's findings were also deficient because it did not consider at all "(1) 'whether the prosecution has applied the proffered reasons for the exercise of the disputed challenges even-handedly to all prospective jurors[,] (2) 'the overall pattern of the prosecution's use of its peremptory challenges[;]' and (3) 'the composition of the jury ultimately selected to try the case.'" State v. Oscar Osorio (August 4, 2008)

MEGAN'S LAW

The Appellate Division affirmed orders invalidating municipal ordinances prohibiting convicted sex offenders from living within a designated distance of schools, parks, playgrounds and daycare centers. Without ruling on various constitutional challenges, the Court held that the ordinances are preempted by state law and therefore invalid. G.H. v. Township of Galloway (July 15, 2008)

POST-CONVICTION RELIEF (PCR)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. There was a prima facie showing that triggered the need for an evidentiary hearing with respect to some of defendant's claims of ineffective assistance, specifically counsel's failure to: (1) call defendant's parole officer, who allegedly interviewed a store employee who could not identify defendant's photo as being that of the robber, as a witness at trial; (2) explore and, if appropriate, retain an identification expert; and (3) move for disclosure of the confidential informant mentioned by the investigating officer, who "testified that a confidential informer identified defendant as one of the robbers".

Each contention involved factual issues, outside the record, that warranted further development. State v. Richard Bailey (July 16, 2008)

Appellate Division reversed the denial of PCR and remanded the case for an evidentiary hearing on whether defendant waived her claim that her attorney was ineffective because she represented both defendant and two co-defendants. The record, albeit not the plea or sentencing transcripts, indicates that the lawyer discussed the potential conflict with defendant. However, the trial judge did not question defendant about it on the record. Although the record is clear that defendant was well aware of the potential conflict prior to sentencing, and elected to withdraw her motion to withdraw her guilty plea and proceed with the plea, the record does no more than suggest a waiver of the conflict. Having failed to develop a record that defendant understandably and knowingly decided to forego separate counsel, an evidentiary hearing must be held to further explore this issue. State v. Richard Bailey (July 16, 2008)

The Appellate Division reversed the denial of PCR and remanded for an evidentiary hearing because the trial judge should have conducted an evidentiary hearing regarding trial counsel's failure to produce an alleged eyewitness to the shooting who allegedly would have testified that defendant did not do it as a witness at trial. According to defendant, his trial attorney indicated that he did not call Kelly, the witness, because he believed -- incorrectly -- that Kelly's out-of-court statement would be

admitted as an excited utterance. The trial judge could not determine whether trial counsel's failure to call Kelly as a witness was meaningful because Kelly's non-appearance at the PCR hearing meant that he could not determine what he may have testified to at the time of trial. Without a clear indication at the present time, or other persuasive evidence, regarding the content of what Kelly's testimony would have been had he testified at trial, the assumption should be that his testimony would have been consistent with the statement he gave police. The lack of a certification from Kelly as to what he would say if called to testify should not be a bar to the conducting of an evidentiary hearing on this PCR petition. Should Kelly remain unavailable, the trial judge should then determine whether post-conviction relief is warranted based upon the record created at an evidentiary hearing. State v. Roy Garcia (June 6, 2008)

SEARCH AND SEIZURE

At the re-trial of this case after reversal, other than not using the suppressed confession, the State's proofs were substantially similar to the first trial, including evidence admitted over defendant's objection, that one of defendant's sneakers seized from his trailer pursuant to a search warrant had a sole pattern that could have caused the imprint on victim's back. The Appellate Division ruled that there was **no probable cause to issue a search warrant for defendant's mobile home** and, in any event, that the facts relating to the search warrant cannot justify a holding that there was probable cause to search when the New Jersey Supreme Court had already concluded that there was no probable cause to arrest the defendant. There is no suggestion in the Supreme Court's opinion or otherwise that the probable cause to arrest, which the State had already admitted was lacking, can be distinguished from the probable cause to search. State v. Richard J. Chippero (May 13, 2008)

Conviction reversed, suppression of evidence ordered by the Appellate Division. CDS found inside an apartment the police "pushed their way into" after determining it was the source of "a strong odor of burnt marijuana" were subject of an illegal entry and seizure. However, the motion judge mistakenly concluded that the initial entry was authorized by defendant. Consequently, because the judge's ultimate legal conclusion was based on the erroneous notion that defendant's subsequent consent to search followed a legal entry into his home, the State failed to carry its heavy burden of proving, by "clear and positive testimony" that defendant's consent was both knowing and voluntary. The Court also concluded that **"the State has failed to prove the consent was not the product of the unlawful entry.** The evidence showed that a mere three minutes elapsed between the forced entry and defendant's execution of the consent-to-search form. Thus, in both time and

place, the consent sprang directly from the illegal conduct. State v. Henry L. Cornish (June 26, 2008)

Conviction reversed, suppression ordered by the Appellate Division. **Officer's questioning of defendant** regarding "if there was anything he 'should know about'" in the car, **without Miranda warnings following defendant's arrest** for an outstanding warrant, which led to an admission that there were drugs in the car, was **improper, and fruits of that questioning must be suppressed**. Defendant was asked the crucial question while obviously in custody, standing handcuffed to the rear of a police vehicle. Miranda warnings should have been given to defendant prior to the inquiry made here. The "public safety" exception to Miranda is inapplicable here because the "police had no particular reason to fear the presence of needles or weapons. State v. Ormond A. Davis (July 16, 2008)

Conviction reversed, suppression ordered by the Appellate Division. Search of motor vehicle after it was stopped and defendant (driver) and his passenger were removed from the car cannot be justified under either the **automobile exception** or the **search-incident-to-arrest exception** to the warrant requirement. We concur with the motion judge's finding that the police had probable cause to arrest him, either for admittedly violating the motor vehicle laws or for the observed apparent narcotics transaction. The ensuing police entry into the vehicle compartment, however, cannot be justified as incident to arrest because the defendant was already out of the car, and was not carrying the bag of drugs that were found in the car. The automobile exception also is inapplicable because even accepting the presence of probable cause here, there was nothing exigent about this roadside stop, once both defendant and his passenger had been secured behind the Chrysler. The two men were not uncooperative or threatening. The police were not outnumbered, and there was no accident requiring the diversion of traffic. State v. Deon Pemberton (August 1, 2008)

SENTENCING - MISCELLANEOUS

Case remanded for further proceedings by the Appellate Division to address whether the aggregate period before parole eligibility has been increased by virtue of the increase of the specific term of fifteen years to seventeen years with NERA to apply, as compared with the original aggregate sentence of fifteen years with NERA to apply and a consecutive seven-year sentence. However, if the increased sentence on the aggravated sexual assault conviction results in the increase of the aggregate period of parole ineligibility and real time to be served before parole eligibility, the specific **term may not be increased above the term which would produce the same period of parole ineligibility as the original sentence**. State v. Michael A. Cooper (August 6, 2008)

Order denying State's motion to sentence defendant to life without parole affirmed by the Appellate Division. The Court granted leave to appeal to decide whether a defendant who faced only a thirty year period of parole ineligibility for a murder committed in 1994, if he was not sentenced to death under the former death penalty complex repealed on December 17, 2007, could be sentenced to life-without-parole as a result of the statute which repealed capital punishment. Court concluded that such a sentence could not be imposed because it would violate the Ex Post Facto provision of the United States Constitution. State v. Steven R. Fortin (June 4, 2008)

Sentence vacated by the Appellate Division, case remanded for re-sentencing or withdrawal of guilty plea. Where defendant and State agreed to that defendant would receive a non-custodial probationary sentence in return for his plea to a disorderly persons offense and several motor vehicle offenses, it was error for the sentencing judge (who did not take the plea) to impose a sixty day jail sentence on one of the motor vehicle defenses, treat that sentence as a municipal court matter, and then "hear[] the appeal [of that sentence] from himself, and, not surprisingly, [finding] nothing improper about the sentence. State v. Moindola Massaquoi (July 18, 2008)

Convictions affirmed, sentenced reduced from NERA nine to NERA seven by exercise of Appellate Division's **original jurisdiction**. Here, the trial judge who heard the case resentenced defendant after another judge, unfamiliar with the trial, had originally done it and expressed good reasons for the reductions. Bypassing the procedural issues and concerns related to the resentencing raised by the State, the Court was satisfied that the sentence imposed after a trial, by a judge who did not hear the testimony, must be deemed "shocking" and inappropriately imposed. It could not ignore what the judge, who observed the witnesses and sat through all the proceedings, said and the fact she had a different view as to the appropriate sentence - - a difference of over a year in 'real time' given the NERA component, and modified the nine-year sentences to seven years with NERA to apply to the sentence imposed for the sexual assault. State v. Wilfredo Ruiz (July 24, 2008)

WITNESSES

Convictions reversed by the New Jersey Supreme Court because trial court abused its discretion by refusing to grant an adjournment in order to enforce the order to produce a defense witness incarcerated in a different county jail. In advance of trial, defendant issued a subpoena and obtained a court order compelling the production of the witness. The trial court's failure to briefly recess the trial to enforce that order

constituted an abuse of discretion. Defendant must be provided the opportunity to establish whether the witness would have given favorable testimony. If the court determines that the witness's testimony would have been favorable, a new trial must be ordered. State v. Luis Garcia (June 18, 2008)